

## EPA Ethics Advisory 90-02

SUBJECT: Outside Communications Regarding Matters  
Under Investigation in Pre-Litigation Stages  
or in Litigation

FROM: Gerald H. Yamada  
Deputy General Counsel  
Designated Agency Ethics Official

TO: Deputy Ethics Officials

The purpose of this Ethics Advisory is to discuss how EPA employees should deal with verbal and written inquiries from outside parties (especially attorneys) concerning EPA matters known to be in litigation, in pre-litigation stages (e.g., negotiation), or under investigation. Unlike litigation between individuals, where an attorney's communication with a party represented by counsel is strictly limited,[see endnote 1] an attorney representing a party in litigation with the Agency may not be prohibited per se from communicating with the Agency,[see endnote 2] depending on the jurisdiction. [See endnote 3] Accordingly, EPA employees must be alert to situations where opposing counsel seeks to communicate with EPA attorneys or officers or employees in the affected EPA program office about a matter under investigation or in litigation.

In addition to attorneys, outside parties may also include States or members of Congress, as well as the general public. Although EPA maintains a cooperative relationship with States, they may occasionally be adversaries in litigation. In addition, even where EPA could furnish such information to Congress itself,[see endnote 4] inquiries from individual members of Congress or their staffs regarding matters which are under investigation, in pre-litigation stages or in litigation should be handled the same as any other outside communications.

When such communications occur, EPA employees must be careful not to disclose non-public information that will interfere with an investigation or litigation. Providing "expert opinions" and advisory interpretations in connection with such matters should also be avoided (unless such opinions and interpretations have been formally adopted by the Agency).

Communications concerning various types of matters should be handled as follows:

### Federal Matters in Litigation

When a communication concerns a matter in litigation (either an enforcement action or defensive litigation), EPA employee's must coordinate any response with the lead EPA attorney for the matter. For defensive litigation, this attorney will be in the Office of General Counsel (OGC) or the Office of Regional Counsel (ORC); for enforcement matters, this attorney will be in the Office of Enforcement (OE) or the Office of Regional Counsel (ORC); for enforcement

matters arising under Title II of the Clean Air Act, the lead attorney will be in the Office of Mobile Sources within the Office of Air and Radiation (OAR). [See endnote 5]

When a case involving the Federal Government is before a court, the lead EPA attorney must consult with the Justice Department on the matter before providing any response.

#### Matters Affecting State Enforcement Actions

When a response may affect a pending State enforcement action, OE should be consulted before EPA provides any response.

#### Criminal Matters

When an outside communication concerns a criminal matter which has been referred to the Justice Department, EPA employees must simply refuse to provide a response. Such communications must be forwarded for response to the Department of Justice or the appropriate U.S. Attorney's Office -- through OE's Deputy Assistant Administrator for Criminal Enforcement for criminal enforcement matters or through the Inspector General Division in OGC for other criminal matters.

As for matters under criminal investigation, EPA employees must state: "EPA has a policy to neither confirm nor deny the existence of a criminal investigation." See OE memorandum dated December 22, 1989 from Assistant Administrator James Strock. Freedom of Information Act requests for documents concerning a criminal investigation should be directed to the Office of Criminal Enforcement or the Inspector General Division in OGC, as appropriate.

\* \* \*

Finally, EPA attorneys must comply with the duty to maintain the confidences and secrets of the client (that is, EPA) and to keep appropriate EPA personnel informed of communications relevant to the client office. See ABA Model Rule 1.4(a). EPA attorneys ordinarily should not communicate (and must advise other EPA employees not to communicate) with opposing counsel about a matter known to be in litigation, in pre-litigation stages, or under investigation without first consulting with the lead attorney for the matter. [See endnote 6]

Of course, when a matter is before a court, EPA attorneys must also consult with the appropriate attorney at the Department of Justice or the U.S. Attorney's Office.

cc: Office of Government Ethics

#### Endnotes

1. ABA Model Code of Professional Responsibility, Disciplinary Rule 7-104; ABA Model Rules of Professional Conduct, Rule 4.2.
2. ABA Model Rule 4.2 states that communications "authorized by law include, for example,

the right of a party to a controversy with a government agency to speak with government officials about a matter." The Comments on the Rule state that opposing counsel are otherwise generally barred from communicating "with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization...or whose statement may constitute an admission...." See also Upjohn Co. v. United States, 449 U.S. 383 (1981).

3. Rule 4.2 of new District of Columbia Bar Rules effective January 1, 1991, require only that attorneys "disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer."

4. The "Congress" includes the Speaker of the House, the President pro tempore of the Senate, and chairs of committees and subcommittees.

5. OAR enforcement attorneys will either be in the Field Operations Support Division (FOSD) or Manufacturers Operation Division (MOD).

6. ABA Model Code of Professional Responsibility, Disciplinary Rule 7-104; ABA Model Rules of Professional Conduct, Rule 4.2.